IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2348 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Nos. 1 & 3 to 5 No.
No.2 Yes.

MAHESH RAMJILAL NATH

Versus

STATE OF GUJARAT

Appearance:
MR DM THAKKAR FOR M/S THAKKAR ASSOC. for Petitioner
MS.SIDDHI TALATI ASSISTANT GOVERNMENT PLEADER
for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA
Date of decision: 17/11/98

ORAL JUDGEMENT

This petition under Article 226 of the Constituion of India has been filed by the petitioner seeking two reliefs, one in the nature of certiorari for quashing the detention order dated 9.3.1998 passed against him by the Detaining Authority in exercise of powers under section 3(2) of the Gujarat Prevention of Antisocial Activities Act,1985 (for short 'PASA') and for a writ of habeas corpus praying for his immediate release from illegal detention.

The brief facts are that along with the detention order grounds of detention were supplied to the petitioner and from these grounds it appears that the petitioner was allegedly involved in business of foreign liquor and transporting the same from Rajasthan to Ahmedabad and selling it at Ahmedabad. It was not an isolated activity. He was hauled up six times under the Prohibition Act and five cases were registered against him under this Act. One case was also registered against him in the year 1996, under various sections of the I.P.C. The Detaining Authority came to the subjective satisfaction that the petitioner was a bootlegger dealing in illegal activity of transport and sale of foreign liquor in Ahmedabad and is also a dangerous person. Two incidents dated 15.1.1998 and 12.2.1998 were also mentioned in the grounds of detention which were supported by two witnesses. Since the witnesses were afraid of the activities of the petitioner they did not like to disclose their identity. The Detaining Authority exercising privilege under section 9(2) of the PASA Act withheld the names and addresses of the witnesses in the grounds of detention.

The grounds of detention have been challenged by the learned Counsel for the petitioner mainly on six counts. These are (1) The alleged activities of the petitioner do not amount to disturbance of public order nor create any problem in maintenance of public order, (2) That the petitioner was placed under preventive detention despite the fact that he was in judicial custody in CR No.5003/98 and in police custody CR No.5006/98, (3) That the privilege claimed by the Detaining Authority in withholding the names and addresses of the witnesses is arbitrary and contrary to law, (4) That the representation of the petitioner sent to the State Government was not decided which has caused material prejudice to him and his continued detention is illegal, (5) That copies of two documents supplied to the petitioner are not legible which has affected the right of the petitioner to make effective representation against his illegal detention, (6) That the grounds of detention are vague.

The learned Counsel for the petitioner and the learned Assistant Government Pleader have been heard on these points.

So far as the vagueness of grounds of detention is concerned, I do not find any merit in this contention. The grounds of detention have been examined. Specific grounds have been disclosed. The details of cases

against the petitioner have been set out. The two incidents, with reference to date, time and place have also been given in the grounds of detention. Consequently it is difficult to accept the contention that the grounds of detention are vague. On this count the grounds of detention or the detention order cannot be quashed.

Another contention has been that the two documents supplied to the petitioner were illegible as a result of which his right to make effective representation was taken away. The two documents were shown to me. One document is legible and it can be read. There is no difficulty in understanding its contents. So far as the other document is concerned it is copy of bail application in Criminal Case No. 61/96 under IPC. It is incorrect that entire document is illegible. Few lines are not legible concerning injuries mentioned in the injury report. The bail application was no doubt referred in the grounds of detention and it has been relied upon by the detaining authority but it is not such illegible document from which the petitioner could not have known what was contained in it. After all it was his bail application and he must have maintained and kept copy thereof. Consequently on this ground, it is difficult to accept the contention that the petitioner's right to make effective representation has been taken away or that there has been violation of Article 22(5) of the Constitution of India.

Another ground of attack is that the privilege claimed by the Detaining Authority is arbitrary and contrary to law. This contention is also without substance. In the grounds of detention the Detaining Authority has mentioned whether the fear of the witnesses is true or not and for this purpose he made reliable inquiry though the Competent Officer of his office. Before that Competent Officer the witnesses stated to the effect that there is fear in their mind from the activities of the petitioner. Thus, it is not a case where reliable inquiry was not made by the Detaining Authority. Privilege under section 9(2) of PASA was therefore rightly exercised by the Detaining Authority. This ground too has no merit.

Another contention has been that the representation of the petitioner sent to the State Government was not decided by it and as such his continued detention is illegal. In para 2 of the counter affidavit of Shri J.R.Rajput, Under Secretary, Government of Gujarat, it is admitted that the representation dated

12.3.1998 signed by the Advocate of the detenu addressed to the Chief Minister was received in the office of the Chief Minister on 16.3.1998. Since it was not addressed to the proper authority it was forwarded to the Home Department on the same date. However, according to the averment made in para 2 of the counter affidavit the representation could not be considered because it was not supported by any authority letter from the petitioner or vakalatnama signed by him in favour of the Advocate. In order to cure these defects communication dated 18.3.1998 was sent to the Advocate to provide authority letter and vakalatnama to enable the State Government to consider the representation. However, since no response was received from the petitioner's Advocate there arose no question of delay in considering the petitioner's representation. This stand of the State Government can hardly be justified especially in face of direct authority of the Supreme Court in Balchand Chorasia Vs. Union of India, AIR 1978 SC Pg.297. In this case also the representation was sent through Counsel of the detenu. It was not considered by the Government at all. The High Court found that the representation was not given by the detenu but it was given by Shri Ramjethmalani who was Member of Parliament. The representation was considered by the Apex Court and it found that the same was given by Shri Ramjethmalani not as a Member of Parliament but on instructions from his client viz.,detenu. In the facts and circumstances of the case, the Apex Court reversed the view taken by the High Court and observed that in matters where the liberty of the subject is curtailed and a highly cherished right is involved, the representation made by the detenu should be construed liberally and not technically so as to frustrate or defeat the concept of liberty which is enshrined in Art.21 of the Constitution. The facts of the case before me are also identical. Here also the representation was sent by an Advocate of the detenu-petitioner which is admitted in the counter affidavit of Shri J.R.Rajput, Under Secretary, Government of Gujarat. No requirement of law could be placed before me by the learned Assistant Government Pleader under which Advocate sending such representation is required either to obtain signature or thumb impression of the detenu or an authority letter or Vakalatnama from the detenu. If it was a representation sent by the Advocate under the instructions of the detenu and for and on behalf of the detenu it should have been considered by the State Government to be the representation of the detenu. No doubt the State Government demanded the said Advocate to furnish authority letter and Vakalatnama but till date the representation is not decided. After

waiting for a reasonable time it was open to the State Government to reject the representation by observing that Vakalatnama and authority letter were not furnished. Even this ground, in view of the Apex Court's judgment cited above, could not be sustained. Thus, non consideration of representation of the detenu has rendered his continued detention illegal and on this ground the order of detention can be quashed and has to be quashed.

Another contention of the learned Counsel for the petitioner has been that the petitioner was admittedly in judicial as well as in police custody, in two criminal cases mentioned in the grounds of detention and in these circumstances placing the petitioner under preventive detention was hardly justified. In support of his contention he has referred the verdict of the Supreme Court in Ahmedhussain Shaikhhussain Vs. Police Commissioner, Ahmedabad, AIR 1989 SC 2274. In this case the facts were that the detenu was already in jail in connection with criminal offence. Still he was kept under preventive detention. Citing number of decisions of the Apex Court in this case, it was held that the fact that the detenu was in jail at the time the order of detention was made and the possibility of his release from jail being made a ground of detention can not be approved. It was emphasised that the Detaining Authority must disclose that there is cogent and relevant material constituting fresh facts to necessitate making order of detention. Possibility of detenu's release from jail is not a ground for detention. However, in subsequent decisions, the Apex Court has clarified the law relating to preventive detention when the detenu is already in jail. The first case is of Kamarunnissa Vs. Union of India, AIR 1991 SC 1640. In the same volume another case of Abdul Sathar Ibrahim Manik Vs.Union of India, AIR 1991 SC 2261 has been reported.

Having considered the catena of earlier decisions of the Apex Court in these two cases and especially in Abdul Sathar's case (Supra) the following guidelines were laid down :

(1) A detention order can validly be passed even in the case of a person who is already in custody. In such case, it must appear from the grounds that the authority was aware that the detenu was already in custody.

(2) When such awareness is there then it should further appear from the grounds that there

> was enough material necessitating the detention of the person in custody. This aspect depends upon various considerations and facts and circumstances of each case. If there is a possibility of his being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order. The order cannot be quashed on the ground that the proper course for the authority was to oppose the bail and that if bail is granted notwithstanding such opposition the same can be questioned before a higher Court."

It is thus clear from these two decisions that the detention order can be validly passed even in cases where the person is already in jail and in judicial custody. The requirement is that these facts must be in the knowledge of the Detaining Authority. Further requirement is that it must appear from the grounds that there was enough material necessitating the detention of the person in custody and this depends upon various considerations and facts and circumstances of each case. If there is a possibility of the person being released and on being so released he is likely to indulge in prejudicial activity then that would be one such compelling necessity to pass the detention order.

In the case before me the Detaining Authority has taken into consideration the fact that the petitioner was in judicial custody in CR No.5003/98 and in police custody in CR No.5006/98. He was also anticipating that the petitioner may be released on bail in these two cases. These two cases were also under Prohibition Act. The grounds of detention disclose as many as six cases against the petitioner under Prohibition Act. In such state of affairs and facts it cannot be said that the Detaining Authority has entertained unreasonable apprehension that on being released on bail in these two cases the petitioner may indulge in repeating similar activities. Thus, for the reasons stated above this also cannot be a ground for quashing the detention order.

The last contention has been that the activities of the petitioner cannot be said to have disturbed public order or has created problem in the maintenance of public order.

From the grounds of detention it seems that the petitioner has been detained on two grounds. Firstly,

for being branded as bootlegger within the meaning of section 2(b) of the PASA Act and secondly, being dangerous person within the meaning of section 2(c) of the PASA Act.

Subjective satisfaction of the Detaining Authority that the petitioner is dangerous person is not based on material which is required to render the petitioner as dangerous person. Dangerous person within the meaning of section 2(c) of the PASA means a person, who either by himself or as a member or leader of a gang, habitually commits, or attempts to commit or abets the commission of any of the offences punishable under Chapter XVI or Chapter XVII of the Indian Penal Code or any of the offences punishable under Chapter V or the Arms Act. There is no material disclosed in the grounds of detention that the petitioner was ever punished under Chapter V of the Arms Act. So far as the offences under Chapter XVI or Chapter XVII of the IPC are concerned, the requirement is that the petitioner should have been habitual in committing such offence. The word 'habitual' means that there should be repetition in commission of such offences. A single commission of offence under sections 143, 147, 148, 149, 120B, 307, 324 and 506(1) of the Indian Penal Code cannot be enough for branding the petitioner as dangerous person. No repeated activity under these chapters of the I.P.C. has been alleged or disclosed against the petitioner.

Coming to his activity as bootlegger it may be said prima facie that he is bootlegger within the definition of section 2(b) of the PASA Act. Merely because the petitioner is bootlegger it cannot be said that his activity disturbs the public order. Even within the explanation of section 3 of the PASA Act, it cannot be said that such activity of the petitioner has disturbed public order. Explanation to section 3 reads as under :

> "For the purpose of this sub-section, public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia if any of the activities of any person referred to in this sub-section directly or indirectly, is causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any action thereof or a grave or widespread danger to life, property or public health."

Deeming concept of disturbance of public order

within the ambit of this explanation is not automatic and every bootlegger cannot be said to be disturbing public order unless such activity directly or indirectly causes or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. Simple bootlegging activity cannot be branded as disturbing public order.

Two incidents dated 15.1.1998 and 12.2.1998 are of routine nature. It is not clear from the grounds of detention that in support of these two incidents four witnesses were examined and their statements were considered by the Detaining Authority. There is mention of consideration of statements of four witnesses at two places in the grounds of detention. The learned Counsel for the petitioner contended that this indicates non application of mind of the Detaining Authority. The learned AGP on the other hand contends that it is merely an ambiguity and actually four witnesses were examined and their statements were considered by the Detaining Authority and copies of statements of all the four witnesses were furnished to the petitioner. Leaving aside this ambiguity in the grounds of detention if the two incidents are considered in right perspective it cannot be said that mere sale of wine or its unloading at public place by the petitioner and individual incidents on that score had disturbed public order.

The maintenance of law and order and maintenance of public order have different concepts. Any criminal activity of a person may create law and order situation in the locality but every law and order situation does not necessarily amount to disturbance of public order. The activities which are objectionalbe or are criminal in nature and which are confined between two individuals cannot be said to disturb public tranquility and peace at large. Such incidents between two individuals whether inside the house or on road or at public place cannot amount to disturbance in public order as was observed by the Apex Court in Piyush Kantilal Mehta Vs. Commissioner of Police, AIR 1989 SC Pg.491. Public order is said to have been disturbed when in a particular locality even tempo of life of the society or public of that locality is disturbed. If peace and tranquility in a particular locality is disturbed by offending activities of the petitioner it can be said that disturbance of public order was created by the petitioner. Bootlegging activity by itself is not disturbance of public order. In Piyush Kantilal Mehta (Supra) the Apex Court observed that it may be that the petitioner is a bootlegger within

the meaning of section 2(b) of the Act, but merely because he is bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-sec.(4) of section (3) of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order. Here also, similar allegations were made in the statements of witnesses against the petitioner.

Contrary to this, learned AGP cited pronouncement of this Court in Gopal Gangaram Nepali Vs. Commissioner of Police, 37(3) GLR 823. However, the verdict of this case can be applied keeping in view the verdict of the Apex Court in Piyush Kantilal Mehta (Supra) and also with reference to the facts before me under consideration. Any authority cannot be applied without considering the facts of the case.

Coming to the two incidents narrated in the grounds of detention the first is of 15.1.1998 and the second is of 12.2.1998. The detention order was passed on 9.3.1998 but there is no material to show that the petitioner repeated his activities after 12.2.1998. Thus, for about more than three weeks there was no allegation of repetition of petitioner's activity.

The first incident occurred near the school. Here the petitioner was allegedly unloading boxes of liquor from vehicle. Since this activity was being carried on near school the witness objected to it, whereupon the petitioner became angry and had beaten the witness and took out sword from vehicle and threatened the witness. The witness raised alarmed, whereupon other people gathered. Upon this the petitioner became angry and rushed towards people, who gathered at the spot, to give blow with sword. So public ran away and traffice on the road was disturbed. Thus, according to the Detaining Authority the detenu created an atmosphere of fear in the locality. This incident however suffered from non application of mind by the Detaining Authority. There is no averment that anybody from the crowed attempted to catch hold of the petitioner and intervened in the incident. If there was no apprehension from the crowed the petitioner would not have run with sword towards crowed. Even though sword was with the petitioner, yet he did not inflict any injury by sword, a sharpedged weapon. Thus, such incident might have occurred in a public place but the petitioner cannot be said to have created disturbance in maintenance of public order.

Similar is a situation in the second incident

dated 12.2.1998 near temple which is said to be a public place. The petitioner was selling boxes of wine. Upon the objection of the witnesses they were beaten in public Threats were extended by the petitioner to the witnesses and to the people who collected at the spot. It was a routine type of narration of incident without disclosing that either the witnesses or members of the crowed sustained injury at the hands of the petitioner. Even if this incident is considered to be true it can hardly be said to have created disturbance of public order near the school.

In view of the above discussions I am of the view that the two incidents against the petitioner narrated in the grounds of detention were hardly enough for creating disturbance of public order.

In view of the aforesaid discussions it flows that the representation of the petitioner was not decided by the State Government and till date it has not been decided as a result of which the continued detention of the petitioner has been rendered illegal. Secondly, since the alleged two activities of the petitioner do not constitute disturbance of public order order of detention becomes illegal. Further, since it is not established prima facie that the petitioner is a dangerous person his detention under the impugned order becomes illegal. On these counts the impugned order of detention cannot be sustained and is required to be set aside.

The writ petition therefore succeeds and is hereby allowed. The detention order dated 9.3.1998 against the petitioner is hereby quashed. The petitioner shall be released forthwith unless he is wanted in connection with any other criminal case.

Sd/-
(D.C.Srivastava, J)
m.m.bhatt